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January 25, 2012

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Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, DC 20554

Re: Sandwich Isles Communications, Inc.
Motion for Stay
WC Docket No. 09-133

Dear Ms. Dortch:

Sandwich Isles Communications, Inc. ("SIC"), through its attorneys and pursuant to Sections 1.43 and 1.44 of the Commission's Rules, 47 C.F.R. § 1.43, 1.44, electronically files the attached Motion for Stay with the Wireline Competition Bureau. Due to exigent circumstances stated in the Motion, it is respectfully requested that the Bureau respond to this request by Monday, January 30, 2012.

This Motion for Stay has been filed electronically through the Commission's Electronic Comment Filing System procedures. If you have any questions or require additional information, kindly contact SIC's undersigned attorney at (202) 344-4653.

Sincerely,

/s/ Frederick M. Joyce
Frederick M. Joyce

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Sandwich Isles Communications, Inc.	)	**WC Docket No. 09-133**
Petition for Declaratory Ruling	)	
	)	

To: Chief, Wireline Competition Bureau

MOTION FOR STAY

Sandwich Isles Communications, Inc. ("SIC"), through its attorneys and pursuant to Sections 1.43 and 1.44 of the Commission's Rules, 47 C.F.R. § 1.43, 1.44, hereby respectfully requests that the Wireline Competition Bureau (the "Bureau") grant this Motion for Stay. A stay is necessary to prevent any and all adverse regulatory and quasi-regulatory actions related to the Bureau's September 29, 2010 Declaratory Ruling while the FCC considers SIC's pending Petition for Reconsideration. *Sandwich Isles Communications Petition for Declaratory Ruling*, Declaratory Ruling, WC Docket No. 09-133 (Wir. Comp. Bur. Sept. 29, 2010) ("Declaratory Ruling"). As explained herein, recent actions by the National Exchange Carrier Association ("NECA") are in violation of the Communications Act, the FCC's rules and the Declaratory Ruling and are likely to cause irreparable harm to SIC and SIC's customers.

Summary of Relevant Facts

In 2008, after initially indicating its consent, NECA subsequently refused to allow SIC to include all of its $15 million annual inter-island cable lease costs in the Traffic Sensitive Pool. *See* Declaratory Ruling at ¶ 5. Instead, NECA authorized only $1.9 million in costs, based on SIC's existing cable lease arrangements. *Id.* at ¶ 18. Because of NECA's decision, SIC was

compelled to file a Petition for Declaratory Ruling with the FCC, wherein it asked this agency to order NECA to accept all of SIC's annual cable lease costs in the Traffic Sensitive Pool. The FCC's Wireline Competition Bureau performed a "used and useful" analysis and applied "equitable factors," such as the unique aspects of the islands served by SIC, before concluding that 50% of SIC's cable lease costs should be recovered. *Id.* at ¶ 17.

On October 29, 2010, SIC filed a Petition for Reconsideration of that decision with the Bureau, seeking 100% recovery of its costs from the NECA Traffic Sensitive Pool. That Petition remains pending before the Bureau. AT&T filed an Application for Review of the Bureau's decision with the full Commission, arguing that the FCC cannot justify its 50% recovery proposal and that the FCC should follow NECA's recommendation; that is, that only $1.9 million of SIC's cable lease costs should be included in the Traffic Sensitive Pool.

Recent NECA Actions Warrant a Stay

SIC did not submit a request for stay with the Bureau at the time it filed its Petition for Reconsideration under the assumption that neither the FCC nor NECA would take any actions adverse to SIC's interests while the Petition remained subject to FCC review. Unfortunately, recent actions by NECA make this request necessary; in the absence of a stay SIC and its customers will be irreparably harmed.

Attached to this Motion is a letter from NECA to SIC, dated January 16, 2012, which highlights the most recent dispute between NECA and SIC. See Letter of S. Barrett, NECA to J. Ushio, Sandwich Isles Communications, Inc. (January 16, 2012), attached hereto as Exhibit One. Notwithstanding FCC regulations that prohibit the use of competitive or unregulated services to subsidize regulated services, NECA has demanded that SIC include over $2.2 million in non-

regulated income in the NECA Traffic Sensitive Pool. Said NECA, "any non-regulated revenues received for the use of the Paniolo [cable] facilities are to be treated as a reduction to the lease expenses pursuant to the framework established in the FCC's Declaratory Ruling ...."

NECA has threatened to "override" SIC's cost studies by the end of this week, Friday, January 27. *See* R. Deegan, NECA letter to F.M. Joyce (January 24, 2012), attached hereto as Exhibit Two. Expedited action by the FCC will be necessary to prevent NECA from violating the Communications Act, the FCC's rules and the FCC's Declaratory Ruling.

NECA's assertions with respect to SIC's unregulated revenues are contrary to FCC regulations and to the FCC's Declaratory Ruling that is under review. Moreover, should NECA be allowed to proceed with its incorrect interpretation of FCC precedents and regulations, SIC and SIC's customers will suffer irreparable harm. Given that a Federal District Court has already determined that this particular dispute between SIC and NECA belongs before the FCC, SIC has no choice but to ask the FCC to stay NECA from its inappropriate course of conduct. *See Sandwich Isles Communications, Inc. v. National Exchange Carrier Association*, No. 10-02341, Memorandum Op. ABJ (D.D.C. July 29, 2011).

NECA is Violating the Act and FCC Rules.

The recent dispute between SIC and NECA involves a considerable sum of money, $2.2 million in non-regulated income from a non-common carrier customer, Oceanic Time Warner. Given that these are non-regulated revenues, the Communications Act and FCC regulations prohibit SIC from including these revenues in its rate-regulated cost base. Section 254(k) of the Communications Act states that "a telecommunications company may not use services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k). The

FCC incorporated this statutory prohibition into its rules when it created FCC Rule 64.901. *See Cross-Subsidy Prohibition*, 12 FCC Rcd 6415 (FCC 1997). In adopting this regulation, the FCC stated that it addressed the statutory concern "that ILECs may attempt to gain an unfair market advantage in competitive markets by allocating to their less competitive services, for which subscribers have no available alternative, an excessive portion of the costs incurred by their competitive operations." In short, what NECA has proposed to do, as soon as Friday of this week, would be in violation of the Communications Act and the Declaratory Ruling.

Notwithstanding statutory and regulatory provisions to the contrary, NECA argues that SIC is, pursuant to the Declaratory Ruling, required to treat 50% of its non-regulated revenues "as a reduction to the lease expenses pursuant to the framework established in the FCC's Declaratory Ruling ...." Exhibit One. NECA has demanded that SIC submit "a corrected 2010 cost study" and other "updated" submissions to comply with NECA's interpretation of the Declaratory Ruling. Should SIC refuse to do so NECA has made it quite clear that it intends to "override" SIC's pooled costs "to bring settlements into compliance with the FCC Order." *Id.*

NECA's stated plan, to unilaterally "override" SIC's cost studies, is entirely inappropriate, it is in violation of FCC regulations and it is particularly unwarranted given that the Bureau is still considering the merits of SIC's Petition for Reconsideration. Accordingly, the FCC should order NECA to "stand down" from its attempt to intimidate SIC into making significant and financially harmful revisions to its cost studies. At a minimum, this dispute is directly related to SIC's on-going dispute with NECA over how the Paniolo lease costs should be treated under the FCC's regulations and precedents. Consequently, the FCC, not NECA, should determine whether and to what extent unregulated income from leased cable facilities should be

treated as a reduction to SIC's cable lease costs. In the meantime, SIC's characterization and treatment of non-regulated income should be deemed reasonable and accurate and NECA's actions to the contrary should be stayed.

The Declaratory Ruling required NECA to include 50% of SIC's cable costs in the regulated revenue requirement. The FCC order was clear and unambiguous that 50% of the cable costs are "used and useful" for regulated service, not unregulated service. The FCC established a bright line, which NECA is now threatening to violate. The other 50% of the costs that the FCC excluded from the regulated revenue requirement includes costs incurred to provide unregulated services, such as the services provided by SIC to Time Warner. NECA, however, is attempting to circumvent the FCC's decision by including less than 50% of the cable costs in the regulated revenue requirement and allocating more than 50% of the costs to unregulated accounts. NECA is engaging in unlawful self-help, in violation of the Act, the FCC's Rules and the Declaratory Ruling. If NECA disagreed with the 50% "used and useful" Commission determination it should have sought reconsideration. As NECA did not do so, it cannot now obtain the same result through unilateral self-help. NECA has no authority to ignore the FCC's Declaratory Ruling; a stay is necessary to prevent NECA from engaging in unlawful self-help.

The Legal Standards for a Stay Apply

The Bureau may grant a stay pending review of a petition for reconsideration "in its discretion." *See* 47 C.F.R. §1.102(b)(2). That standard is more flexible than the judicial standard for obtaining injunctive relief. For instance, the FCC may grant a stay pending reconsideration even where the petitioner has *not* shown any likelihood of success on the merits. *See, e.g., Angeles Broadcasting Network*, 59 R.R. 2d 758 (1985) (stay granted to avoid

interruption of service to the public despite agency conclusion that petition lacked merit). In other cases, the Commission has granted a stay though there was no showing of "irreparable injury," which is typically necessary to obtain a judicial injunction. *See Lompoc Valley Cable TV*, 1 R.R. 2d 1081 (1964) (stay granted due to "policy questions" raised by the petitioner).

The Bureau should in this instance exercise its discretion and grant this Motion for Stay, so that NECA cannot take any adverse action against SIC and SIC's customers pending review of SIC's Petition for Reconsideration and the important policy questions raised therein. The FCC is well aware of SIC's fragile financial status from disclosures made under seal in this and related proceedings. NECA's attempt to treat non-regulated income as regulated revenues would seriously exacerbate SIC's financial condition, threatening SIC's ability to provide essential communications services to thousands of native Hawaiian customers.

Even under the traditional "four-prong test" for obtaining a judicial stay or injunctive relief, this stay should be granted. The FCC has held that in administrative proceedings such as this one "[t]here is no requirement that there be a showing as to each criterion. The relative importance of the four criteria will vary depending upon the circumstances of the case. If there is a particularly overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors." Implementation of Sections 309(j) and 337 of the Communications Act as Amended, Order, WT Docket No. 99-87, 18 FCC Rcd. 25491 at ¶ 6 (December 3, 2003) (footnotes omitted). SIC's request for a Stay meets these flexible standards for injunctive relief.

Should the FCC decide to apply the more stringent "four-factor test" that governs appeals of agency decisions, this Motion for Stay should still be granted. *See, e.g., Washington Metropolitan*

Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), *citing Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The jurisprudential test for injunctive relief is a "flexible one," *see Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986); an "absolute certainty of success" is not required. *Id.*, *citing Cuomo v. U.S. Nuclear Regulatory Comm.*, 772 F.2d 972, 974 (D.C. Cir. 1985). SIC's Motion for Stay meets each of the "four factors" that warrant injunctive relief.

With respect to the first factor, "likelihood of success on the merits," SIC's petition for reconsideration raises many serious questions that are at least "fair ground" for agency review. See, e.g., Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195 (4th Cir. 1977) (injunctive relief may be granted when the petitioning party submits questions that are serious, substantial, difficult, doubtful and "fair ground" for litigation). By contrast, NECA's interpretation of the FCC's Declaratory Ruling with respect to its proposed treatment of SIC's non-regulated income contradicts a plain reading of the FCC's rules, regulations and precedents.

The second factor for the FCC to consider in requests for stay is the likelihood of irreparable harm. *See Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843. SIC and SIC's customers would likely suffer irreparable harm absent a stay. NECA has already caused SIC financial harm by refusing to allow it to recover 100% of SIC's cable lease costs from the Traffic Sensitive Pool. Now, NECA wants to take SIC's non-regulated income and treat half of it as a deduction to SIC's cable lease expenses. *See* Exhibit One. A subsequent victory by SIC on reconsideration will not suffice to undo the interim harm that NECA's actions would cause to SIC's finances, its operations and indeed its business reputation. "[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor *or loss of goodwill*, the

irreparable injury prong is satisfied." Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994) (emphasis added).

The third factor for the FCC to consider is whether a grant of this stay request will harm "interested third parties." *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843. To date, only AT&T Communications has asserted any interest in SIC's cost study dispute with NECA; it is inconceivable that a stay of NECA's adverse actions would cause any grief to AT&T. And, while the non-regulated revenues in question are substantial to SIC, NECA cannot in good faith contend that its on-going operations or the interests of all of NECA's other members will be adversely affected by a grant of this stay.

Finally, the public interest, the fourth factor to consider under the long-standing test for injunctive relief, will be amply served by a stay of NECA's planned course of action. As the Bureau knows, SIC is a Rural Local Exchange Carrier that was granted a "Benefit License" by the State of Hawaii, Department of Hawaiian Home Lands (DHHL) on May 9, 1995, for "the purpose of advancing the rehabilitation and the welfare of native Hawaiians." By virtue of the license granted by DHHL, SIC has assumed the obligation for the State of Hawaii to provide all wireline communications services on the Hawaiian Home Lands, which were designated "Tribal lands" in the Commission's recent Universal Service Reform Report and Order. SIC thus plays a critical role with the State of Hawaii in promoting essential economic services for native Hawaiians and resettling the Hawaiian Home Lands. NECA's recent actions, by contrast, threaten to undermine SIC's efforts to provide broadband services and create a robust broadband platform to foster economic development and jobs for native Hawaiians, particularly on the more remote "neighbor islands" that surround Hawaii's economic hub of Oahu.

A grant of this Motion for Stay will provide some assurances that no further harm can befall SIC's efforts to provide Hawaiian Home Lands residents with adequate voice and broadband services. Moreover, a grant of this Stay will help foster the broader national interests embodied in the trust obligations created by the U.S. Congress with the passage of the Hawaiian Homes Commission Act of 1920.

Conclusion

For all the foregoing reasons, SIC respectfully requests that the Bureau grant this Motion for Stay, and order NECA to cease and desist from taking any actions that would be adverse to SIC and SIC's customers during the pendency of this Petition for Reconsideration.

Respectfully submitted,

Sandwich Isles Communications, Inc.

By: _____
Frederick M. Joyce
Its Attorneys

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Wasgton, DC 20004
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Date: January 25, 2012

EXHIBIT ONE
(NECA January 16, 2010 letter)

NECA
6400 S. Fiddler's Green Circle, Suite 1300
Greenwood Village, CO 80111

Susan Barrett
Director
PH 303-893-4409
FX 800-551-1328
sbarrett@neca.org

January 16, 2012

Ms. Judi Ushio
Director Corporate Services
Sandwich Isles Communications
27th Floor, Pauahi Tower
1003 Bishop St.
Honolulu, HI 96813

Dear Ms Ushio:

This letter is in follow up to our prior discussions regarding the proper regulatory treatment of the rental and/or incidental revenues that Sandwich Isles received for use of its' facilities during 2010. During the course of the review of the cost study submission, we noted that Sandwich Isles had recorded $2,232,308 in Account 7990.1 Non-Regulated Income. Discussions with your consultant, GVNW, indicated that these revenues were received from Oceanic Time Warner for use of the facilities that Sandwich Isles leases from Paniolo. Based on the conversations with Jim Rennard, we appear to have different positions on the appropriate treatment of non-regulated revenues related to the Paniolo facilities.

It is NECA's position that any non-regulated revenues received for the use of the Paniolo facilities are to be treated as a reduction to the lease expenses pursuant to the framework established in the FCC's Declaratory Ruling [1] and as further explained in our October 21, 2010 correspondence to Alan Pedersen of SIC and Ben Harper of GVNW (attached).

We hereby request that Sandwich Isles submit a corrected 2010 cost study, related pooling along with updated ICLS, LSS and USF submissions by January 24th. If Sandwich Isles is unable to provide corrections, please let us know and we can develop the proposed adjustments for your use in pooling. If Sandwich Isles refuses to provide corrections, NECA will override the pooled costs to bring settlements into compliance with the FCC Order. Should you have any questions or concerns, please do not hesitate to contact me at 303-893-4409.

Sincerely,

Susan M Barrett

Attachment

[1] *Sandwich Isles Communications, Inc., Petition for Declaratory Ruling,* Declaratory Ruling, WC Docket No. 09-133, DA 10-1880 (Wir. Comp. Bur., rel. Sept. 29, 2010)

EXHIBIT TWO
(NECA January 24, 2012 letter)

Joyce, Rick

From: Deegan, Robert <rdeegan@neca.org>
Sent: Tuesday, January 24, 2012 3:24 PM
To: Joyce, Rick
Cc: gvogt@vogtlawfirm.com; Barrett, Susan
Subject: 1 23 12 Email to S. Barrett RE Sandwich Isles Communications

Mr. Joyce:

Please be advised that NECA will be left with no choice but to override certain data, as indicated in Ms. Barrett's January 16, 2012 letter, if your client does not make the requested changes by Friday, January 27, 2012 at 5:00 EST. Further, as you well know, NECA is represented in this matter by Gregory J. Vogt, Esq. Any further questions or communications from you on this matter should be directed to his attention.

Regards,

Bob Deegan

Robert J. Deegan
Corporate Counsel
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CERTIFICATE OF SERVICE

I, Lula Robinson, a legal assistant in the law firm of Venable LLP, hereby certify that on this 25th day of January, 2012, a copy of the foregoing Motion for Stay was filed with the FCC's electronic filing system and served on the following by electronic mail:

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Diane Griffin Holland, Counsel
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